

# The Big Deal

## Ethical Issues in Economic Development Negotiations

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# The Big Deal

**Cloudy and foggy**  
77° 62°  
Areas of fog before 9 a.m. Mostly cloudy in the afternoon.

**SEGUIN** Celebrating 120 Years  
**GAZETTE**  
**ENTERPRISE**  
★ Bringing Life To Your Doorstep Since 1888 ★

**CHRISTMAS COLORS**  
Find out more from Forest Mims about this plant that sports the colors of the holiday season. — SEE LEARNING ZONE, PAGE 8

<b>1,450 JOBS</b> The new facility is expected to employ more than 1,450 in the area over the next five years.	<b>\$170 MILLION</b> The capital investment in the new facility is estimated at \$170 million.	<b>\$21 AN HOUR</b> The average wage is projected at \$21 an hour or more than \$44,500 a year plus benefits.	<b>180 ACRES</b> The 1 million square foot facility will sit on 180 acres near Interstate 10, Highway 46 and Highway 90	<b>2010 OPEN</b> The facility is projected to begin partial production in 2010 and be in full production in late 2011
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### SEGUIN'S NEW ECONOMIC ENGINE

Caterpillar unveils plans to build new engine plant in city

## The Big Deal



- ▶ Number 50 on Fortune 500
- ▶ 100,000 employees worldwide
- ▶ World's largest manufacturer of diesel engines

## The Project

- ▶ \$180 million investment in Seguin
- ▶ One million square foot manufacturing facility
- ▶ 190 acre campus



- ▶ 1400 new jobs

## The Incentives

(aka "The Bait")

- ▶ City
  - Property tax abatement
  - Infrastructure improvements
- ▶ EDC
  - Secured real estate
  - \$2 million
- ▶ County – Property tax abatement
- ▶ ISD – HB 1200 incentives
- ▶ State – \$10 million Texas Enterprise Fund
- ▶ Triple Freeport Exemption

## The Timeline

- ▶ December 18, 2008
  - Incentive package approved by Tax Abatement Committee, EDC, City Council & County Commissioners' Court
  - Cat employees in Illinois & SC notified of lay-offs
- ▶ December 19, 2008
  - Closed on real estate
- ▶ January 21, 2009
  - Ceremonial groundbreaking
- ▶ April 2009
  - Dirt moved

## The Lawyers

- ▶ Corporate counsel
- ▶ City & EDC
- ▶ Local counsel representing landowners

## The Ethical Issues

- ▶ Communication
- ▶ Confidentiality
- ▶ Conflicts of Interest

## Communication

- ▶ **Rule 4.02** – Communicating with those represented by counsel
  - (a) “...a lawyer **shall not communicate** or cause or encourage another to communicate about the **subject of the representation** with a **person, organization or entity of government** the lawyer knows to be **represented by another lawyer** regarding that subject, unless the lawyer has consent of the other lawyer or is authorized by law to do so.”
  - (b) Extends prohibition to expert witnesses

## Communication

- ▶ **Rule 4.01** – Truthfulness in Statements to Others
  - “...a lawyer shall not knowingly make a false statement of material fact or law to a third person...”
- ▶ **Comment 1 to Rule 4.01**
  - “...under generally accepted conventions in negotiation, a party’s supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact.”

# Communication

## ▶ Rule 4.02

- (c) For the purposes of this rule, organization or entity of government includes:
  - Those presently having managerial capacity with an organization or governmental entity relating to the subject of representation; or
  - Employees of the organization whose behavior, as it relates to the subject of representation, could make the organization vicariously liable for that behavior.

# Communication

## Corporate Counsel Considerations

## ▶ Ethical negotiating = striking a balance

- **Rule 1.02** – Zealous representation
  - Lawyer shall abide by client's wishes, but shall not assist or encourage fraudulent conduct
- **Rule 4.01**
  - Avoid material misstatements, while respecting conventions of negotiation

## Communication

### Corporate Counsel Considerations

- ▶ Ethical negotiating = striking a balance
  - Lawyer's Creed
    - "A lawyer shall employ all appropriate means to protect and advance the client's legitimate...objectives."
    - "I will treat adverse parties with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct."

## Communication

### Corporate Counsel Considerations

- ▶ If talking to directly to City or EDC staff, ensure that you have the consent of the city attorney or EDC counsel.
- ▶ Avoid speaking directly to City Council members (without consent).
  - Ethics Opinion 474 (1991)
  - Opposing Counsel violates Rule 4.02 if, without city attorney's knowledge or consent, he directly discusses settlement offer with individual council members.

## Communication Corporate Counsel Considerations

- ▶ Be aware of the Open Meetings Act
- ▶ Avoid polling a majority of the governing body
  - See Attorney General Opinion JC-307
  - Private person may be prosecuted for aiding in the circumvention of the Open Meetings Act
    - See Government Code 551.143 & 551.144
    - See Penal Code 7.01 & 7.02

## Communication Corporate Counsel Considerations

- ▶ Chapter 36, Penal Code
- ▶ Bribery (36.02)
  - Offering or accepting any benefit in exchange for official act
- ▶ Gift to public servant (36.08)
  - Accepting any benefit from person subject to official's jurisdiction
- ▶ Offering gift to public servant (36.09)
  - Offering prohibited benefit
- ▶ Exceptions (36.10)
  - Lawfully reported elsewhere (Title 15, PFS, lobby law)
  - Non-cash items with value less than \$50
  - Food, lodging, transportation or entertainment required to be reported by donor or donee.
- ▶ Important! The exceptions in 36.10 do not apply to **bribery**.



## Communication

### Public Lawyer's Considerations

- ▶ Beware Rule 4.02
- ▶ Who is initially involved?
  - Site selector?
  - Corporate executives?
  - Intergovernmental types?
- ▶ Who becomes involved?
  - Local landowners? (think real estate sales)
    - Rule 4.03 – Dealing with Unrepresented Person
    - Don't imply you're disinterested, and correct any misunderstanding of your role.

## Communication

### Private Lawyer's Considerations

- ▶ By this time, everyone is probably represented by counsel.
- ▶ Avoid talking to council members, EDC board directors, city staff, etc., without consent of entity's counsel.

## Confidentiality

- ▶ **Rule 1.05 – Confidentiality of Information**
- ▶ Confidential info = privileged & unprivileged
- ▶ Don't reveal confidential info, unless client consents
- ▶ Don't use confidential info to client's disadvantage
- ▶ May reveal confidential info to client's representatives or member's of lawyer's staff

## Confidentiality

### Corporate Counsel Considerations

- ▶ Disclosure as part of negotiation
- ▶ Disclosure to contractors
  - See Ethics Opinion 572 (2006)
- ▶ Please, recognize the restrictions facing public entities:
  - Public Notice Requirements
  - Open Meetings Restrictions
  - Billing practices
  - Permits

## Confidentiality

### Public Counsel's Considerations

- ▶ Take your negotiating direction from an authorized agent of the entity (see Rule 1.12)
- ▶ Disclosure to contractors
  - See Ethics Opinion 572 (2006)
- ▶ City vs. EDC
  - So long as entities have common interests, counsel can share confidential information

## Confidentiality

### Public Counsel's Consideration

- ▶ Attorney Fee Bills
  - Government Code 552.022(a)(16)
    - Information in attorney fee bills are public unless it is within the attorney-client privilege (TRE 503)
    - See Open Records Decision 676 (2002)

## Confidentiality

### Public Counsel's Considerations

- ▶ **Non-Disclosure Agreements**
- ▶ **Helpful Hint:**
- ▶ If business prospect insists on city/EDC signing a non-disclosure agreement, reserve the ability to seek a ruling from the Office of the Attorney General and to abide by the AG's decision on whether to disclose the information.

## Conflicts of Interest

- ▶ **Rule 1.06(b)**
- ▶ May not represent a person if representation involves a substantially related matter in which that person's interests are materially adverse to that of another client
- ▶ May not represent a person if the representation is limited by lawyer's obligation to another client or third person
- ▶ **Rule 1.06(e):** Must withdraw as necessary to remedy conflict

## Conflicts

### Public Counsel's Considerations

- ▶ Common representation of City and EDC
- ▶ So long as the two share common legal interests, representation should be permitted
- ▶ If the interest of the City and EDC become potentially adverse, lawyer should look to rule 1.06 and Rule 1.07 (Lawyer as Intermediary Between Clients)
- ▶ What could cause common interests to become adverse?

## Conflicts

### Public Counsel's Considerations

- ▶ Closing the Deal vs. Doing it Legally
  - Corporation may push for secrecy & speed
  - Public counsel will need to be mindful of limitations facing governmental entities.
    - Public Notice/Input, Open Meetings, Open Records, Permitting, etc.

**Rule 2.01 requires a lawyer to exercise independent professional judgment and to render candid advice.**

## Conflicts

### Private Counsel's Considerations

- ▶ Representing multiple landowners
  - ▶ Rule 1.06 prohibits representing multiple clients in the same matter whose interests are adverse
  
- ▶ Conflict with Lawyer's personal interests
  - Lawyer's own real estate holdings
  - Title company work
  
- ▶ Service on non-profit
  - Rule 1.13, Conflicts: Public Interest Activities

## Conclusion

- ▶ In economic development negotiations
  - Negotiate ethically
  - Communicate as permitted
  - Safeguard confidential information
  - Beware potential conflicts of interest

# The End

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